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Susu Lembu Asli Marketing Sdn Bhd v Dutch Lady Milk Industries Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–190 OF 2002
HISHAMUDIN YUNUS J
B 6 APRIL 2004

Arbitration — Arbitrator — Appointment — Application for — Plaintiff opposed application on ground that matter should not be referred to arbitration — Issue of fraud fully argued in earlier application — Whether plaintiff could raise issue of fraud again in defendant's application to
C *appoint arbitrator — Whether application to appoint arbitrator to be allowed*

Civil Procedure — Res judicata — Decision, finality of earlier decision — Issue of fraud fully argued before judge in earlier application — Whether plaintiff could raise issue of fraud again in defendant's application to appoint arbitrator — Whether parties bound by judge's decision

D The plaintiff and the defendant had entered into an agreement under which the defendant agreed to manufacture, pack and supply for the plaintiff various dairy products at the rates agreed between them. However, differences arose between the parties which resulted in the defendant issuing a letter of demand to the plaintiff for payment for products supplied and delivered to the plaintiff.
E The plaintiff, in turn, responded by issuing a notice to the defendant purporting to rescind the agreement on the grounds that the plaintiff's consent thereto was vitiated by fraud and/or misrepresentation on the part of the defendant.

Subsequently, the plaintiff filed a writ of summons and statement of claim against the defendant. After entering appearance, the defendant filed an application for
F a stay of proceedings pending reference to arbitration. The defendant's application (encl 14A) to refer to arbitration was based on cl 13 of the agreement which stipulated that any dispute which might arise between the parties in relation to the agreement should be finally settled by arbitration in accordance with the Arbitration Act 1952 ('the Act').

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The plaintiff objected to encl 14A. One of the issues raised by the plaintiff before the judge was whether in the light of the allegation of fraud by the plaintiff in the statement of claim, the matter should be litigated before the High Court instead of referring it to arbitration. On the issue of fraud, the judge considered
H that the allegation of fraud was not by itself sufficient reason for the court to refuse a stay as the court had the discretion to decide otherwise, depending on all the circumstances of the case. The judge made the finding that there was a likelihood of causing irreparable damage to the defendant's commercial reputation if the disputes were to be heard in open court due to the negative publicity that may be generated. Accordingly, the judge granted encl 14A.

I

This was the defendant's interlocutory application to appoint the arbitrator, aretired Court of Appeal judge, as a single arbitrator pursuant to s 12 of the Act.

The plaintiff had no objection to the Court of Appeal judge being appointed as the arbitrator but was nevertheless opposed the application on the ground that the matter should not be referred to arbitration in the first place since its claim was premised upon fraud and as such, should be adjudicated before the High Court on the basis of s 25(2) of the Act.

Held, allowing the defendant's application:

Since the issue regarding fraud and the jurisdiction of the High Court had already been fully argued before and adjudicated by the judge, this issue was now *res judicata* and should not have been raised by the plaintiff in the present application. The parties were bound by the decision of the learned judge (see para 18).

[**Bahasa Malaysia summary**

Plaintif dan defendan telah memasuki satu perjanjian di bawah mana defendan bersetuju untuk membuat, membungkus dan membekalkan kepada plaintif pelbagai produk tenusu pada kadar yang telah dipersetujui oleh mereka. Perbezaan timbul di antara mereka dan mengakibatkan defendan mengeluarkan satu surat tuntutan terhadap plaintif untuk bayaran bagi produk yang telah dibekalkan dan dihantar kepada defendan. Plaintif seterusnya telah mengeluarkan satu notis kepada defendan bertujuan untuk membatalkan perjanjian itu atas alasan-alasan bahawa persetujuan plaintif adalah tidak sah kerana fraud dan/atau salah nyata di pihak defendan. Seterusnya, plaintif memfailkan satu writ saman dan penyata tuntutan kepada defendan. Selepas memasukkan kehadiran, defendan telah memfailkan satu permohonan untuk penggantungan prosiding sementara menunggu rujukan kepada timbangtara. Permohonan defendan (lampiran 14A) untuk merujuk kepada timbangtara adalah berdasarkan kl 13 perjanjian yang menyatakan bahawa sebarang pertikaian yang membangkit di antara pihak-pihak yang ada berkenaan dengan perjanjian itu sepatutnya diselesaikan secara timbangtara menurut Akta Timbang Tara 1952 ('Akta itu')

Plaintif membantah kepada lampiran 14A. Salah satu daripada isu yang dikemukakan oleh plaintif di hadapan hakim tersebut adalah sama ada memandangkan pendakwaan fraud oleh plaintif dalam penyata tuntutan, perkara ini sepatutnya dibicarakan di hadapan Mahkamah Tinggi dan bukan dirujuk kepada timbangtara. Mengenai isu fraud, hakim menimbangkan bahawa pendakwaan fraud sahaja bukan sebab yang mencukupi untuk mahkamah menolak permohonan penggantungan pelaksanaan kerana mahkamah mempunyai budibicara untuk memutuskan sebaliknya bergantung kepada semua keadaan kes. Hakim mendapati bahawa terdapat kemungkinan 'irreparable damage' kepada reputasi komersial defendan sekiranya pertikaian ini dibicarakan di hadapan mahkamah terbuka oleh kerana publisiti negatif yang boleh di timbulkan.

Ini adalah permohonan interlokutori defendan untuk melantik penimbangtara tersebut, seorang hakim Mahkamah Rayuan yang sudah bersara sebagai

penimbang tara perseorangan menurut s 12 Akta itu. Plaintif tidak membantah kepada pelantikan hakim Mahkamah Rayuan tersebut sebagai penimbangtara tetapi membantah kepada permohonan itu atas alasan bahawa perkara ini tidak sepatutnya dirujuk kepada timbangtara kerana tuntutan mereka adalah berdasarkan fraud dan oleh itu sepatutnya dibicarakan di hadapan Mahkamah Tinggi menurut s 25(2) Akta tersebut.

Diputuskan, membenarkan permohonan defendan:

Memandangkan isu mengenai fraud dan bidangkuasa Mahkamah Tinggi sudah di hujahkan dan diadjudikasikan di hadapan hakim, isu ini sekarang *res judicata* dan tidak sepatutnya dibangkitkan oleh plaintif dalam permohonan ini. Pihak-pihak terikat kepada keputusan hakim yang arif (lihat perengggan 18).].

Notes

For cases on appointment of arbitrator, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1150–1157.
For cases on finality of earlier decisions, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 5102–5118.

Cases referred to

Lai Siew Wah Sdn Bhd v Ng Chin [1988] 1 MLJ 393 (refd)
Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu [2000] 3 MLJ 699 (refd)

Legislation referred to:

Arbitration Act 1952 ss 12, 25(2)

Tan Hock Chuan (MO Lai and Joan Chong with him) (Tan Hock Chuan & Co) for the plaintiff.
CW Teo and (YB Tan with him) Khaw & Partners) for the defendant.

Hishamudin Yunus J:

[1] The summons in chambers at encl 40 dated 10 July 2003 is the defendant's interlocutory application to appoint Dato' Karam Chand Vohrah ('Dato' KC Vohrah'), a retired Court of Appeal judge, as a single arbitrator pursuant to s 12 of the Arbitration Act 1952 ('the Act').

[2] Section 12 of the Act provides:

> Power of High Court in certain cases to appoint an arbitrator or umpire.
>
> 12In any of the following cases:
>
> (a) where an arbitration agreement provides that reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within twenty-one clear days after the service of the notice, the High Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

[3] The plaintiff objects to this application.

[4] Before going into the merits, I shall first touch briefly on the background that led to this application.

[5] On 10 October 2000 the plaintiff and the defendant entered into an agreement under which the defendant agreed to manufacture, pack and supply for the plaintiff various dairy products; and in return for these services the plaintiff agreed to pay the defendant at the rates agreed between the two parties. However, later, in the carrying out of the agreement, differences arose between the parties. In January 2002 the defendant issued a demand letter to the plaintiff asking for payment for products supplied and delivered to the plaintiff.

[6] The plaintiff, in turn, responded by issuing in February a notice to the defendant purporting:

(1) to rescind the agreement on the grounds that the plaintiffs consent thereto was vitiated by fraud and/or misrepresentation on the part of the defendant; or

(2) alternatively, to terminate the production agreement on account of breach of the term thereof.

[7] In the same month the defendant replied in writing disputing the plaintiff's right to rescind or terminate the agreement or to claim damages from the defendant, and reminding the plaintiff that the agreement was still in force.

[8] In February 2002 the plaintiff filed a writ of 'summons and statement of claim against the defendant. Particulars of the plaintiff's claim of fraud against the defendant are pleaded therein.

[9] After entering appearance, the defendant, by summons in chambers vide encl 14A, filed an application for a stay of proceedings pending reference made to arbitration. The defendant's application to refer to arbitration is based on cl 13 of the agreement. This clause stipulates:

13 ARBITRATION

Any dispute or difference which may arise between the PARTIES at any time hereafter whether during the continuance in force of this Agreement or upon its termination, touching any matter or thing therein contained or the operation or construction of this Agreement or any matter or thing in any way connected with, arising from or in relation to this Agreement or the rights, duties, liabilities of the

PARTIES hereunder shall be finally settled by arbitration in accordance with the Arbitration Act 1952 (Revised 1972).

[10] The Arbitration Act provides for a party to apply for a stay of proceedings where there is submission to arbitration. Section 6 of the Act states:

> 6 If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with' the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

[11] That application (encl 14A) was objected to by the plaintiff. One of the issues raised by the plaintiff before the learned judge at the hearing of encl 14A was whether, in the light of the allegation of fraud by the plaintiff in the statement of claim, the matter should be litigated before the High Court instead of referring it to arbitration.

[12] Azmel J heard encl 14A and granted the defendant's application. On the issue as to whether the matter should instead be heard before the High Court by reason of the plaintiffs allegation of fraud, the learned judge ruled as follows:

> It has been a well established principle that in order to succeed under s 6 of the said Act the applicant must satisfy 4 requirements, namely:
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> (1) that the legal proceedings have been commenced against the applicant in respect of a matter which has been agreed should be referred to arbitration;
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> (2) that no other steps in the proceedings be taken by the Applicant before the making of the application for stay;
>
> (3) that there is no sufficient reason why the matter ought not to be referred to arbitration as agreed between the parties; and
>
> (4) that the Applicant was at the time of the application, remains ready and able to do all things necessary for the proper conduct of the arbitration.
>
> In respect of the first requirement I was quite satisfied that the defendant had shown that the production agreement which became the subject matter of dispute between the plaintiff and the defendant contained an arbitration clause as provided by cl 13 (referred to above). I was also satisfied that this legal proceedings were commenced by the plaintiff by filing the writ of summons against the defendant on 26 February 2002 in this court.
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> In respect of the second requirement it was an undisputed fact that in this court proceedings all that the defendant had done was only entering of its appearance.

The defendant had not even filed the statement of defence. In the light of such facts I ruled that the defendant had not taken any steps in the proceedings yet.

It was in respect of the third requirement that the plaintiff strenuously argued that it had more than sufficient reasons why the matter should not be referred to arbitration. The plaintiff had given the following grounds in opposing the defendant's application for a stay of the proceedings:

(1) ...; (not relevant)

(2) …;

(3) …;

(4) …;

(5) that the plaintiff has a *bona fide* allegation of fraud against the defendant and hence a reference to arbitration would not be appropriate in accordance with s 25 of the Arbitration Act 1952; and

(6) …

As to its fifth ground, the plaintiff contended that there existed an issue of fraud against the defendant and hence a reference to arbitration would not be appropriate. However the various authorities referred by the sefendant do not appear to support the plaintiff's contention.

In *Radford v Hair & Anor* [1971] 2 All ER 1089 where the plaintiff opposed the defendant's application for a stay of proceedings on the ground that the defendant had made various allegations impugning the plaintiff's professional reputation. The court held that because the allegations were akin to allegations of fraud against the plaintiff and against such allegations, the plaintiff was entitled to have his case tried by a judge in open court.

In the case of *Cunningham-Reid & Anor v Buchanan-Jardine* [1988] All ER 438, the English Court of Appeal made the following principles:

(1) Where a party accused of fraud opposed a stay of proceedings, the court would almost invariably refuse a stay; and

(2) Where the party alleging fraud opposed a stay and the party accused of fraud wished to proceed to arbitration, the allegation of fraud was not by itself sufficient reason for the court to refuse a stay. Instead the court had discretion dependent on all the circumstances of the case.

In the same case Bingham LF said:

> The fact that an apparently strong case exists is a consideration relevant to the exercise of the court's discretion but one that can only be entertained with full recognition that the case has not been tried and that the defendant's contentions have not been disclosed, let alone investigated here is no rule that it is appropriate to retain a case in the High Court because a charge of fraud is made against a professional or quasi-professional whether that person does not wish trial in open court. The defendant here wants to arbitrate and is entitled by virtue of the

A agreement to arbitrate unless good reasons exist against the course. In my judgment there is no such good reason and the judge gave quite insufficient weight to the arbitration agreement, which is, in the language sometimes used by continental lawyers, the law between the parties.

B On this issue, it was my finding that the plaintiff had failed to give any good reasons as to why the disputes should not be referred to arbitration. On the other hand the defendant had shown concern of likelihood of negative publicity that may befallen to the defendant with the likelihood of causing irreparable damage to the defendant's commercial reputation if the disputes were to be heard in the open court. I therefore decided to exercise my discretion in favour of the defendant.

C **[13]** Having succeeded in its application, the defendant thereafter, on 26November 2002, gave notice to the plaintiff proposing the appointment of Dato' KC Vohrah as arbitrator. The plaintiff, however, did not concur to the proposed appointment.

D **[14]** Hence, the defendant invokes s 12 of the Act and *vide* encl 40 makes the present application.

[15] In his written submission, the learned counsel for the plaintiff states that, in principle, the plaintiff has no objection to Dato' KC Vohrah being appointed as the arbitrator. The learned counsel, however, asserts that the
E plaintiff, nevertheless, opposed the application. And the objection of the plaintiff to the application, as the learned counsel for the plaintiff puts it, is on the ground that the matter should not in the first place be referred to arbitration. The plaintiff's argument is that, as its claim is premised upon fraud, the matter should instead be adjudicated before the High Court. The plaintiff relies on s 25(2) of the Act. This provision states:

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(2) Where an agreement between any parties provides that disputes which may arise in the future between them should be referred to arbitration, and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable that question to be determined
G by the High Court, have power to order that the agreement shall cease to have effect or umpire appointed by or by virtue of the agreement. (Emphasis added.)

[16] And the learned counsel for the plaintiff refers to the Supreme Court case of *Lai Siew Wah Sdn Bhd v Ng Chin* [1988] 1 MLJ 393. In this case cited, Wan Suleiman SCJ held (at p 94):

H

Once the court is satisfied that there is a *bona fide* allegation of fraud against the appellants, then the discretion given to the judge under s 25(3) of the Arbitration Act 1952 was indeed properly exercised.

[17] I have rejected the plaintiff's argument and allowed the defendant's application.

I

[18] In my judgment, as the issue regarding fraud and the jurisdiction of the High Court had already been fully argued before, and adjudicated by, Azmel J

in the defendant's application for stay vide encl 14A (and I have purposely quoted the judgment of the learned judge extensively), the issue is now *res judicata* and should not have been raised by the plaintiff in the present application. The parties are bound by the decision of the learned judge. In this regard, I only need to remind the plaintiff of the following dictum of Gopal Sri Ram JCA in the Court of Appeal case of *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu* [2000] 3 MLJ 699 (at p 709):

> Further, it is equally clear from well-established authority that a State Government is bound by the doctrine of *res judicata*. In this context it is sufficient to quote from the second edition of Professor Hogg's work *Liability of the Crown* at p 191:
>
> > The doctrine of *res judicata* is sometimes treated as a kind of estoppel, namely, estoppel by record. The doctrine stipulates that a judicial decision (unless reversed on appeal) is binding on the parties to the litigation, so that the same issue may not be re-litigated by the parties: once decided by a court of competent jurisdiction, the issue is said to be *res judicata*. The doctrine is obviously required in order to bring disputes to an end. Indeed, litigation would have little point if the losing party, without appealing, or after exhausting appeals, were free to ignore the judgment and return to the courts again.

Order in terms; costs in the cause.

Defendant's application allowed.

Reported by Lim Lee Na